Office - Supreme Court, U.S.
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OCT 18 1982
ALEXANDER L. STEVAS,
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No. 82-242

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Both respondents urge the Court to deny the petition because this case purportedly involves no more than a fact-bound exercise of discretion by the court of appeals that, they claim, was fully consistent with congressional intent, and because the decision below allegedly follows other lower court rulings on the same question. Neither contention is correct.

1. To be sure, Section 307(f) of the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. IV) 7607(f), confers discretion on the courts of appeals to decide when attorneys' fee awards are "appropriate." But the question presented by the petition is not simply whether the court below abused that discretion in this case. Instead, the fundamental issue we have tendered—which is one of law rather than fact—is whether Congress intended the courts *ever* to have discretion to award fees to totally unsuccessful parties.

Contrary to respondents' suggestions, the size or complexity of the case has no bearing on this question. EDF Br. in Opp. 1-2; S.C. Br. in Opp. 1.[1] Nor is it necessary to sift through the voluminous record in this case because respondents concede that the EPA actions they challenged were upheld in every respect. EDF Br. in Opp. 3; S.C. Br. in Opp. 2. Thus, the Court need only determine whether, as a matter of law, the discretion conferred by Congress encompasses fee awards to totally unsuccessful litigants.[2]

Respondents argue that the lower court's interpretation of Section 307(f) is supported, if not compelled, by the legislative history of that provision. But the legislative history does not go so far, and when viewed under the rules of strict construction that govern waivers of sovereign immunity, this history cannot support the award of fees to totally unsuccessful parties.

a. It is well established that waivers of sovereign immunity must be "unequivocally expressed." *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981), quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Respondents do not dispute this doctrine. Rather, they note that this Court has refused to infer immunity where Congress intended to waive it. EDF Br. in Opp. 17. Congressional intent, they argue, is the central inquiry (*ibid.*). But this aphorism does not relax the standard for determining congressional intent or measuring its scope. Congress' intent to waive sovereign immunity must be "affirmatively and unambiguously"

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[1]The Brief in Opposition filed by the Environmental Defense Fund will be cited as "EDF Br. in Opp." and that filed by the Sierra Club will be cited as "S.C. Br. in Opp."

[2]Apparently recognizing that fee awards to totally unsuccessful parties are difficult to justify as "appropriate," respondents have manufactured various "public benefits" allegedly attributable to their lawsuits. Even a cursory examination of these "benefits," however, shows them to be illusory. See pages 7-9, *infra*.

stated, *Lehman* v. *Nakshian, supra,* 453 U.S. at 168, and the waiver must be "construed strictly in favor of the sovereign." *McMahon* v. *United States,* 342 U.S. 25, 27 (1951). Applying these standards to the evidence of congressional intent relied on by respondents, it cannot be concluded that Congress "unequivocally expressed" an intent to authorize attorneys' fees to parties who did not succeed in any tangible manner.

b. Respondents emphasize that Congress rejected a proposal providing that attorneys' fees "shall" be awarded to any party that "prevails" and "may" be awarded to any party that "prevails in part." EDF Br. in Opp. 8-9. But this proposal may have been rejected because it inflexibly required an award to a prevailing party, regardless whether that party had furthered or frustrated the goals of the Act.[3] Rejection of the proposal thus sheds little light on the proper interpretation of the provision ultimately adopted.[4]

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[3]See, e.g., *Carpenter* v. *Andrus,* 499 F. Supp. 976, 979 (D. Del. 1980) (denying attorneys' fees to a successful plaintiff under the Endangered Species Act of 1973's "whenever * * * appropriate" provision, 16 U.S.C. 1540(g)(4), because the suit failed to "advance the statutory purpose").

[4]EDF emphasizes, however, that in choosing between the two versions, Congress expressly considered whether there was "any need to modify the existing judicial practice of awarding fees based on the individual circumstances of each case." EDF Br. in Opp. 13. This consideration, however, says nothing about an intent to award fees to parties that do not succeed in any respect. For, when Congress purportedly endorsed the "existing judicial practice," no court had ever awarded fees to such a party. As explained, *infra,* at pages 4-5, attorneys' fees had only been awarded under Section 304(d) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d), to parties that had in some tangible way furthered implementation of the statute. Indeed, the courts had expressly refused to award fees to parties that had not achieved any such success. *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.,* 62 F.R.D. 353 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975).

EDF also relies on language from the House Report, quoted in our petition at page 24, that rejected a "prevailing party" standard. From this passage, read in conjunction with *NRDC* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973), EDF concludes that Congress intended to allow the award of fees to a party who was not successful in any way, so long as the lawsuit was "constructive and reasonable." EDF Br. in Opp. 14-15

Congress' rejection of a "prevailing party" standard, however, cannot be so broadly construed. The "prevailing party" standard is a term of art, and in 1970, when Congress authorized fees "whenever appropriate" under Section 304(d) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d), the "prevailing party" standard required that fees be denied to any party that had not actually prevailed in final judgment. Pet. 20 n.15. Even by 1977, when Congress amended Section 307 to parallel Section 304, the "prevailing party" standard still required a party to prevail formally, either through settlement or litigated judgment. Thus, for example, in the cases cited by EDF, fees were awarded on the explicit grounds that the plaintiffs had actually prevailed on the legal merits of their claims, although the courts concluded that the relief requested was no longer necessary.[5] And even in decisions involving settlements rather than litigated judgments, fees were allowed only where the plaintiff actually established liability. See *Williams* v. *General Food Corp.*, 492 F.2d 399, 408 (7th Cir. 1974). Thus,

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[5]In *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 430 (8th Cir. 1970), the court specifically held that: "[h]aving prevailed in his contentions of racial discrimination * * * Parham is entitled to reasonable attorney's fees * * *." In *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 340-341 (D. Or. 1969), the district court held that Richards had established a violation of the statute, and thus had formally prevailed. The relief sought was not granted because it had already been obtained by the defendant.

Congress's rejection of a "prevailing party" test does not demonstrate congressional intent to allow attorneys' fees to parties that were not successful in any way.

This conclusion is not altered by the 1977 House Committee's reliance on *NRDC* v. *EPA*. In *NRDC* v. *EPA*, the First Circuit found that Congress authorized attorneys' fees "whenever appropriate" in order "to encourage the achievement of statutory goals." 484 F.2d at 1338. In awarding fees to NRDC, the court noted that NRDC's challenges, "even those not sustained, were mainly constructive and reasonable" (*ibid.*). Seizing on the court's observation that NRDC's challenges were "constructive and reasonable," EDF argues that no more is required: a party is entitled to attorneys' fees if its arguments are "constructive and reasonable," even if it is not successful in any respect. EDF Br. in Opp. 15. EDF ignores the fact that NRDC prevailed on most of its claims. Thus, it is not clear that the First Circuit's reasoning supports EDF's expansive interpretation of the "whenever appropriate" standard; nor is there reason to believe that such an interpretation was endorsed by Congress. As EDF appears to concede, *NRDC* v. *EPA* provided for the award of attorneys' fees "to encourage the achievement of statutory goals." EDF Br. in Opp. 15. In adopting the "whenever appropriate" standard for Section 307, therefore, Congress was simply rejecting the technical and formalistic requirements of the "prevailing party" standard in favor of a more direct concern for the goals of the statute.

Thus, the courts do have discretion to award fees if the plaintiffs have " 'substantially contributed' to the goals of the Clean Air Act" (Pet. App. 20a n.10), even though they did not technically "prevail." But this standard clearly entails some element of success, some tangible contribution that alters the course of EPA implementation of the Clean Air Act, thereby furthering the goals of the statute. In this

case, the court awarded fees for mere participation in judicial review. While such participation may have value, it does not necessarily further any goal of the Clean Air Act.[6] And neither respondent has offered any evidence that mere litigation was within the scope of the goals that Congress intended to further through the award of fees.[7]

c. Sierra Club contends that the court of appeals' interpretation of Section 307 is reinforced by recent congressional action.[8] S.C. Br. in Opp. 8-9. In a mark-up session on a bill to amend the Clean Air Act, the Senate Committee on Environment and Public Works adopted a proposal by Senator Simpson allowing fee awards only to prevailing parties. S.C. Br. in Opp. App. 1-4. Sierra Club argues that, by this action, the Senate Committee implicitly confirmed the court of appeals' interpretation of the existing statute. The amendment, however, can as easily be read as emphatic repudiation of the court of appeals' decision. And, indeed, when he first introduced the proposal, Senator Simpson

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[6]Participation in the rulemaking process may help to ensure that the Administrator's decision is based upon a full exposition of the facts, and thus may further the goals of the statute. Participation in a totally unsuccessful judicial challenge to that decision, however, makes no discernible contribution to the goals of the statute, since it has no effect on the Agency's implementation of the statute.

[7]Indeed, when Congress intended to fund participation for its own sake, it has done so explicitly. See Pet. 27 n.18. Thus, for example, Congress has expressly authorized EPA to award attorneys' fees for participation in rulemakings under the Toxic Substances Control Act, 15 U.S.C. 2605(c)(4)(A). Such funding is rare, however, and it can hardly be inferred that, by providing for attorneys' fees "whenever appropriate," Congress intended, sub silentio, to extend such extraordinary benefits to unsuccessful litigants. Certainly, such an intent has not been "unequivocally expressed."

[8]The speculative possibility that such legislation might be enacted should not deter the Court from considering the important question presented by this case. See *Bryant* v. *Yellen*, 447 U.S. 352, 380 n.32 (1980).

indicated that the court of appeals' decision was contrary to Congress' "original intent."[9] Thus, the committee's action is of no help to respondents.

2. Recognizing their total lack of success on the merits, respondents nevertheless find "public benefits" from this litigation because, in affirming EPA's implementation of the statute, the court articulated procedures for the use of computer models (S.C. Br. in Opp. 2) and for receipt of oral communications after the comment period has closed (EDF Br. in Opp. 2-3). Respondents do not emphasize the fact that the court of appeals explicitly found that EPA was already implementing these procedures (*Sierra Club* v. *Costle*, 657 F.2d 298, 332-345, 400-410 (D.C. Cir. 1981)). Judicial articulation of these rules is therefore of little more than scholarly interest. Certainly, it does not in any sense further the goals of the Clean Air Act.

While conceding that EPA had complied with all of these procedures in implementing the Clean Air Act, EDF asserts that it is entitled to attorneys' fees because the court of appeals' decision caused the Office of Management and Budget to "alter" procedures for rulemaking in the entire

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[9]In the mark-up session on July 27, 1982, Senator Simpson described his proposal as follows:

> Senator Simpson: * * * And then, Mr. Chairman, there were two other items, and I will certainly submit those to the committee. Each of them were [*sic*] something I have discussed before. One was the venue amendment, and that is probably on the list. Another was one attorneys' fees for prevailing parties. That was the original intent and now we have seen several instances where there have been attorneys' fees granted to nonprevailing parties, and that was another area. * * *"

Mark-Up Session on the Clean Air Act Amendments of 1982: Hearings Before the Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess. 6 (1982). (Stenographic Transcript of Milton Reporting, Inc., Washington, D.C.).

Executive Branch.[10] EDF Br. in Opp. 3. This bold claim is based entirely on a memorandum of David Stockman, dated June 11, 1981. EDF Br. in Opp. 1a-2a. The memorandum outlines the roles of the Presidential Task Force on Regulatory Relief and the Office of Management and Budget in agency rulemakings. As EDF points out, the memorandum explains that the procedures therein described will be consistent with the court of appeals' decision in this case. There is no indication anywhere in the memorandum, however, that that decision in any way "altered" the procedures previously employed. And, considering that the court below found that EPA and OMB were already complying with these requirements, there is no reason to believe that any change was effected by this memorandum.

Respondents lastly justify the fee awards by asserting that the litigation benefited EPA. Sierra Club suggests that, while the court concluded that EPA's rulemaking had fulfilled the requirements of the Clean Air Act, Sierra Club " 'aided agency implementation' " of that statute "by instructing EPA on a better (albeit not mandatory) way of conduct rule-makings * * * ." S.C. Br. in Opp. 2. No attempt is made to argue that Congress intended to award attorneys' fees to anyone undertaking such admittedly superfluous instruction.

Both respondents also rely on the court's finding that they had "effectively supplemented" EPA's defense of its regulations against industry challengers. Pet. App. 7a n.5; S.C. Br. in Opp. 3; EDF Br. in Opp. 4. But it was Congress's clear intent that EPA and the Department of Justice should

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[10]EDF also claims that it was "successful" in requiring EPA to divulge factual information relating to the allegedly improper ex parte contacts. EDF Br. in Opp. 5. Since, upon examination by the court of appeals, this information only confirmed the propriety of the Agency's actions, any claim of "success" on this account borders on the frivolous.

defend the regulations promulgated under the Clean Air Act. It is incongruous to assume that Congress also intended to award attorneys' fees to litigants who take it upon themselves to supplement that effort.

3. Both respondents argue that the decision below is consistent with every other federal court decision on the same question. EDF Br. in Opp. 18; S.C. Br. in Opp. 10. The fact is, however, that the cases cited by respondents simply did not involve the question presented here.[11]

In *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), the court *declined* to award fees to an unsuccessful litigant. Although the court observed in dicta that "ultimate success" in a citizen's suit under Section 304 of the Clean Air Act might not be a prerequisite to an attorneys' fee award (62 F.R.D. at 355), the court also stated that fee awards to a losing party should be reserved for those cases in which the litigation "serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor" (*ibid.*). This hardly constitutes an endorsement of fee awards to parties whose "contribution" to the goals of the statute was an unnecessary validation of the Agency's actions. Indeed, elsewhere in the opinion the court questioned whether fees would be "appropriate" when, as here, state or federal pollution control agencies are already actively engaged in fulfilling their statutory duties (*id.* at 357).

Respondents also cite the district court's decision in *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D. D.C. 1974), rev'd, 535 F. 2d 1318 (D.C. Cir. 1976). That decision, of course, is of no precedential value

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[11]The only exception is *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982). That decision, like the one below, was wrongly decided. The decision, moreover, is not final because the Ninth Circuit has not yet fixed the amount of the award.

in light of the court of appeals' ruling that the district court had no jurisdiction to award attorneys' fees. But even the district court's reasoning on the merits shows that plaintiffs in that case accomplished far more than the airing of novel issues. The court made it clear that plaintiffs lost their case to enjoin construction of two buildings primarily because the District of Columbia government had failed to enact the regulatory framework contemplated by the Clean Air Act. 383 F. Supp. at 145. The court thus saw the suit as a helpful and necessary effort to galvanize the District to action. *Id.* at 145-146. By contrast, the court of appeals in the present case found that EPA had already acted properly.

Respondents also contend that the First Circuit's decision in *NRDC* v. *EPA*, 484 F.2d 1331 (1973), sanctions fee awards to losing parties. As we have already explained in our petition, however, NRDC was *successful* in several major respects (see 484 F.2d at 1338), and thus the case did not raise the question presented here. The same is true of *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), relied upon by EDF (Br. in Opp. 18).

Finally, we have already addressed the decision in *Metropolitan Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981). Pet. 19 n.13. As previously noted, the District of Columbia was indisputably in violation of the Clean Air Act when the lawsuit was filed; only a change in the law some three years later prevented plaintiffs from securing a favorable final judgment. This anomalous situation cannot qualify as support for the decision below.

The court of appeals' decision thus represents an unwarranted expansion of litigants' rights to collect attorneys' fees from the government. By rewarding unsuccessful challenges to EPA's implementation of the Clean Air Act, the court has divorced the attorneys' fee provision from any discernible congressional goals, for the sake of subsidizing assistance in the mere "refinement of jurisprudential understanding." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, No. 80-327 (Jan. 12, 1982), slip op. 8.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1982

DOJ-1982-10